

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

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WYMAN GORDON TRU-FORM, LLC,  
Employer,

and

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED-INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION,  
AFL-CIO/CLC,  
Union.

Case Nos. 04-CA-182126  
04-CA-186281  
04-CA-188990

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**PROPOSED INTERVENOR WILLIAM BERLEW’S RESPONSE TO  
THE UNION’S MOTION AND GENERAL COUNSEL’S OPPOSITION**

From the outset of this case, decertification petitioner William Berlew has retained his own counsel and has attempted to participate in this case as a full party to protect his rights under NLRA Sections 7 and 9. His intervention is exactly what is contemplated by General Counsel Memo 18-06, which concerns decertification petitioners’ right to intervene in cases exactly like this one. At every step of the way, Berlew has been thwarted. The Board is long overdue in correcting this travesty, and should allow employees to participate in cases directly affecting the decertification petitions they created and collected. See *Veritas Health Serv. Inc. v. NLRB*, 895 F.3d 69, 89 (D.C. Cir. 2018) (Millet, J., concurring).

The Union and General Counsel now contend that Berlew’s Motion to Intervene and to reopen the hearing to allow him to fully participate should be denied because: (1) his motion and exceptions are allegedly an untimely “motion for reconsideration”; (2) the “law of the case” precludes intervention at this supposedly belated time; (3) a motion for intervention cannot be made post hearing; (4) and intervention is pointless because the evidence Berlew seeks to add

would not change the result.<sup>1</sup> Each of these contentions is easily refuted.

**1. Berlew's Motion And Exceptions Are Not Barred.** The Union and General Counsel incorrectly style Berlew's Motion and Exceptions as a motion for reconsideration. The Union's and General Counsel's contentions are Kafkaesque. Under their theory, if an ALJ denies a motion to intervene, a proposed intervenor may make a request for a special appeal to the Board. If the Board denies the special appeal, the proposed intervenor has 28 days to move for reconsideration. After those 28 days, the Board may no longer accept any other motion to intervene, or even hear exceptions from the proposed intervenor, in the normal course of the review process. Thus, a proposed intervenor who files an unsuccessful special appeal is forever estopped from participating in a review of an ALJ's decision in the normal course of litigation. Of course, had Berlew *not* filed a special appeal, the Union and the General Counsel would now be arguing that he was estopped from seeking review of the denial of intervention because he "failed" to take that extraordinary step.<sup>2</sup>

The Union and the General Counsel cite little case law in support of this proposition, because little exists. The Union's citation to *Teamsters Local 75*, 349 NLRB 77, 80 (2007) is inapposite because that case does not even concern intervention. Moreover, Berlew *is* claiming that the ALJ's failure to grant him intervention was erroneous and unjust in light of what occurred at trial, GC Memo 18-06, and Judge Millet's concurrence in *Veritas Health Services*, unlike

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<sup>1</sup> The Union points to an innocuous typo and wrongfully claims Berlew copied portions of the Employer's brief in support of exceptions, but the Union has it backwards. In reality, the Employer copied those arguments from Berlew's brief. In any event, this squabble is immaterial to the ultimate question of whether or not intervention should be granted to a decertification petitioner in a case that will decide the fate of his petition.

<sup>2</sup> Indeed, the General Counsel argued this in *Leggett & Platt*, Case No. 09-CA-194057, when exceptions were filed to an ALJ's decision to deny intervention. Despite the lack of a special appeal, the Board assumed the exceptions were timely and ruled against the intervention on the merits.

whatever was being argued in *Teamsters Local 75*. 349 NLRB at 80 (“Counsel for the General Counsel does not challenge the validity of the Board’s February 5, 2001 Order or claim that it is erroneous or unjust. Nor does she present evidence that changed circumstances warrant departing from the initial Order, which nothing more than permitted the litigation of statutory claims to continue in order to settle important questions of law. Thus, we deny the General Counsel’s renewed request and address the merits of the case.”).

Neither do the Rules and Regulations support the draconian and byzantine result urged by the Union and the General Counsel. Denial of an emergency special appeal does not serve as permanent *res judicata*, and certainly nothing in the text of Section 102.26 suggests that is the case for an intervention motion. Nor are other parties barred from raising issues that are denied in a special appeal when filing their own exceptions to an ALJ decision. Such an absurd result would carve out proposed intervenors from ever participating in the exceptions process and prevent the Board from reviewing their claims within the normal course of litigation.

According to the Union and General Counsel, if the Board, after reviewing the complete trial record, wanted to find that the ALJ had erred in failing to include the proposed intervenors, it would be powerless to change the result because the proposed intervenors were long ago silenced. Such a result is illogical—of course the Board has the power to grant intervention and hear exceptions. *D.L. Baker, Inc.*, 351 NLRB 515, 528 (2007) (overruling prior order from special appeal because law of the case doctrine “does not limit the tribunal’s power”). Moreover, the Board has many times granted motions to intervene during the exceptions phase of Board proceedings. *Premier Cablevision*, 293 NLRB 931 (1989); *Drukker Commc’ns*, 299 NLRB 856 (1990); *Postal Serv.*, 275 NLRB 360 (1985); *William Penn Broad. Co.*, 94 NLRB 1175 (1951); *Camay Drilling Co.*, 239 NLRB 997 (1978). To hold that Berlew is now estopped from

challenging his exclusion from the case as an intervenor, or even attempting to participate in the exceptions process at all, would punish him for attempting to assert his rights in an interlocutory appeal.<sup>3</sup>

To strike Berlew's attempts to intervene and be heard, and his related exceptions concerning intervention and the merits, would also contradict recent Board cases. For example, the Board has a recent history of at least considering, not striking, exceptions filed by employees whose intervention was denied by an ALJ. In *Veritas Health Services*, 363 NLRB No. 108 (2016), employee Jose Lopez Jr. attempted to intervene at the outset of an ALJ trial to defend the General Counsel's challenge to his withdrawal petition. The ALJ denied Lopez's motion and no special appeal was taken. Instead, Lopez filed his own exceptions to the ALJ's ruling before the Board. *Id.*, slip op. at \*1. The Board ruled on Lopez's exceptions, albeit denying them on the merits. *Id.* at n.1. Similarly, in *Latino Express, Inc.*, 360 NLRB 911 (2014), the Board did not strike the proposed intervenor's exceptions, even after they were the subject of a special appeal. Instead, the Board affirmed its prior order. *Id.* at 911, n.2. The Board gave no indication that it considered the exceptions to be untimely filed or that the issue was res judicata. Moreover, in both cases, the proposed intervenors did not even file motions to intervene with the Board itself, but merely relied on their status as punitive parties under the Board's Rules and Regulations.

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<sup>3</sup> The Union also claims *Boeing Co.*, 366 NLRB No. 128 (2018) forbids post-hearing intervention. *Boeing* is obviously distinguishable. In *Boeing*, a union that was truly an officious intermeddler was attempting to intervene in a case having nothing factually to do with it, by claiming it had an "interest" in the case because the Board's ruling on a legal issue affected its position in a separate, ongoing case. By contrast, this case concerns one issue: the validity of Berlew's petition and the Employer's failure to protect his rights at the hearing. Unlike the officious intermeddler union in *Boeing*, Berlew has attempted to participate at every stage of the process *in this case*. Comparing Berlew to *Boeing* is comparing apples to airplanes. Moreover, the majority in *Boeing*, in fact, recognized there are instances where intervention may be granted post-hearing. *Id.* slip op. at 2, n.3 ("We recognize that, in rare instances, the Board has permitted post-hearing intervention. We need not address those decisions here, given that intervention is unwarranted on multiple grounds in addition to Sec. 102.29.")

Section 102.1(h) of the Board's Rules and Regulations define "party" as a person "*properly seeking* and entitled as of right to be admitted as a party" (emphasis added). Clearly, applicants for intervention are those seeking admission.

Ultimately, finding preliminary denials of intervention to be effectively non-reviewable within the normal course of Board litigation would do nothing to help the efficient administration of the Act.<sup>4</sup> It would cause attempted intervenors to rush to the Board every time intervention was denied by an ALJ. The Board would be forced to review interlocutory appeals hastily with no opportunity for reconsideration to determine whether intervention should have been granted after the trial concluded. It would work a manifest injustice if after the hearing it became apparent that an ALJ wrongly denied intervention and the prior decision was completely insulated from further Board review. Given a D.C. Circuit judge's recent chiding of the Board over its lack of intervention standards, *Veritas Health Services*, 895 F.3d at 89, the Board should want to seize the opportunity to develop both reliable and objective standards and fully articulate the process for intervention.

**2. Berlew Seeks to Authenticate his Petition with Factual Evidence, Which Is Central Under *Levitz*:** Both the General Counsel and the Union claim Berlew has nothing to add to the

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<sup>4</sup> Treating the Board's prior Order as "law of the case" is also no obstacle to review. "Law of the case" doctrine "is not an inexorable command." *Hanna Boys Center v. Miller*, 853 F.2d 682 (9th Cir. 1988). The Board has reversed orders made during special appeals in prior cases. *See D.L. Baker, Inc.*, 351 NLRB 515, 528 (2007) (overruling prior order from special appeal because law of the case doctrine "does not limit the tribunal's power"). There exists good reason to grant intervention here. As explained extensively in the brief in support of exceptions, the Employer failed to properly authenticate the petition at trial, harming Berlew's Section 7 rights. Moreover, the Board has non-existent standards for intervention and grants intervention on an ad-hoc basis. Should the Board announce a new standard for interventions, it will certainly have to reevaluate Berlew's intervention given a change in the law.

hearing, so it is a waste of time to reopen the hearing. These contentions are incorrect.<sup>5</sup>

Berlew attempted to intervene in the trial in order to validate the signatures on his petition. Here, the Employer failed to authenticate some of the signatures at trial because it failed to call certain employees who had signed the petition. (*See generally* Berlew Br. in Support, 13-14). Berlew's interests were directly harmed by the Employer's failure to adduce this evidence at trial. Berlew was prepared to call these other employees as witnesses.

The General Counsel and the Union spill much ink seemingly to argue that an employer is required to authenticate the signatures prior to withdrawal, so additional testimony from other petition signatories in this instance is irrelevant. This is a misunderstanding of *Levitz*. Under *Levitz Furniture Co.*, 333 NLRB 717 (2001), the employer has to prove by a preponderance of the evidence that a union has lost majority support. To do this, an employer is required to authenticate the petition at trial. "Signatures may be authenticated by the testimony of the signer, a witness to the signature, delivery to the solicitor of the card, or by handwriting exemplars that sometimes involve the testimony of an expert witness." *Ambassador Servs., Inc.*, 358 NLRB No. 130 (2012); *adopted in part*, 361 NLRB 939 (2014). Given the petition can be authenticated by *testimony*, the employer does not have to authenticate the signatures at the time that it withdraws recognition—it must do so during the hearing. *See, e.g., Flying Food Grp.*, 345 NLRB 101, 103, n.9 (2005) ("We do not rely on any implication in the judge's decision that, under *Levitz*, an employer's withdrawal of recognition is unlawful where the employer fails to verify the authenticity of a disaffection petition before withdrawing recognition."). To argue otherwise is to ignore that *Levitz* announces an objective standard that seeks to determine the facts, rather than

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<sup>5</sup> Obviously, if the Board finds the petition was tainted by unfair labor practices, there is no need to reach the question of whether intervention was improperly denied because the question of authenticating the petition would be moot. In the event the petition is not "tainted," the petition must be authenticated.

what an employer believes. As stated by the Fourth Circuit: “The *Levitz* standard focuses on the Act’s policy of promoting employee choice by determining *actual* employee desires, rather than employers’ *beliefs* about employee desires, by asking whether there was *in fact* majority support for the union at the time the employer withdrew recognition, *regardless of what the employer believed.*” *NLRB v. B.A. Mullican Lumber*, 535 F.3d 271, 282 (4th Cir. 2008) (emphasis added). The General Counsel’s and Union’s arguments that Berlew cannot now authenticate his own petition with employee testimony turn *Levitz* on its head and substitutes employer belief for objective fact.

### CONCLUSION

The Union’s motion to strike should be denied and intervention granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following additional parties via e-mail as noted:

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October 26, 2018

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